

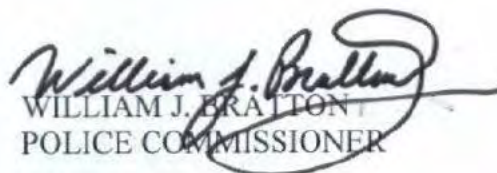


POLICE DEPARTMENT

-----X
In the Matter of the Disciplinary Proceedings :
- against - : FINAL
Detective Cecil Waithe : ORDER
Tax Registry No. 886691 : OF
Quartermaster Section : DISMISSAL
-----X

Detective Cecil Waithe, Tax Registry No. 886691, Shield No. 785, Social Security No. ending in [REDACTED] having been served with written notice, has been tried on written Charges and Specifications numbered 2014-11611, as set forth on form P.D. 468-121, dated April 1, 2014, and after a review of the entire record, has been found Guilty as Charged.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Detective Cecil Waithe from the Police Service of the City of New York.


WILLIAM J. BRATTON
POLICE COMMISSIONER

EFFECTIVE: 0001 hrs., October 9, 2015



POLICE DEPARTMENT

September 28, 2015

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In the Matter of the Charges and Specifications : Case No.
- against - : 2014-11611
Detective Cecil Waithe :
Tax Registry No. 886691 :
Quartermaster Section :
-----X

At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable Robert W. Vinal
Assistant Deputy Commissioner Trials

A P P E A R A N C E:

For the Department: Pamela Naples, Esq.
Department Advocate's Office
One Police Plaza
New York, New York 10038

For the Respondent: James Moschella, Esq.
Karasyk & Moschella, LLP
233 Broadway- Suite 2340
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To:

HONORABLE WILLIAM J. BRATTON
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

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The above-named member of the Department appeared before me on March 23 and 24, 2015, May 4, 2015 and June 15, 2015, charged with the following:

1. Said Detective Cecil Waithe, while assigned to the Organized Crime Control Bureau on or about and between September 18, 2013, and March 18, 2014, did engage in conduct prejudicial to the order, efficiency or discipline of the Department in that said Detective Cecil Waithe wrongfully did ingest marijuana without police necessity or authority to do so.

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS

2. Said Detective Cecil Waithe, while assigned to the Organized Crime Control Bureau on or about and between September 18, 2013, and March 18, 2014, did engage in conduct prejudicial to the order, efficiency or discipline of the Department in that said Detective Cecil Waithe wrongfully did possess marijuana without police necessity or authority to do so.

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS

The Department was represented by Pamela Naples, Esq., Department Advocate's Office. Respondent was represented by James Moschella, Esq. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Guilty.

ANALYSIS OF THE EVIDENCE PRESENTED

It is not disputed that on March 18, 2014, Respondent reported as ordered to the Medical Division's Drug Screening Unit to undergo random drug screening; that Police Officer Sandro Scacchi collected three hair samples by cutting hair off of Respondent's

arms; that two of these hair samples were mailed to Psychomedics Corporation (Psychomedics), a laboratory in California, for testing;¹ and that Psychomedics subsequently notified the Department that both of the arm hair samples had tested positive for the presence of the marijuana metabolite at a concentration of more than three times the administrative cutoff level.

Respondent testified that he has never intentionally or knowingly ingested marijuana and that since he has no idea how his arm hair could have tested positive for the marijuana metabolite, the hair collected from his arms must have somehow become contaminated by or switched with hair collected from another member of the service (MOS), or that some mistake must have been made during the testing process which resulted in a false positive result for the marijuana metabolite.

The Collection of Respondent's Hair Samples on March 18, 2014

Officer Scacchi testified that he had collected hair samples from Respondent in a manner that was consistent with the training he had received from Psychomedics regarding how to properly collect hair samples, training which resulted in his certification as a hair sampler by Psychomedics. Respondent corroborated Officer Scacchi's testimony that the hair that he cut off of Respondent's arms fell on top of wax paper that Scacchi had placed on the cutting table and that he wrapped up the hair samples and placed them inside clear envelopes. Respondent also testified that when Scacchi was cutting the hair off Respondent's arms, no other MOS was in the room providing hair

¹ Consistent with Department policy, the third hair sample was stored at the Medical Division so that if the first two samples tested positive, Respondent could send the third sample to a laboratory of his choosing for testing. Respondent never arranged to have his third hair sample tested.

samples. Although Respondent testified that someone came into the room just past the doorway and removed items, that person "didn't come deep into the room where I was."

Thus, based on Respondent's own testimony his description as to how his hair samples were collected, there is no support for his supposition that the hair that Scacchi cut from his arms must have somehow been mixed with another person's marijuana-contaminated hair during the collection process.

Also, the record is devoid of any evidence that Respondent's hair samples could have tested positive for the marijuana metabolite as a result of any prescription medications Respondent was consuming since he signed a Drug Screening Questionnaire on March 18, 2014, on which he stated that he had not taken any prescription medication in the previous three months. [Department Exhibit (DX) 4]

Scacchi testified that in Respondent's presence and with gloved hands he separated Respondent's hair into three samples and placed each sample into a separate interior paper envelope and an exterior plastic pouch which were then initialed by Respondent and sealed with security tape. In each envelope Scacchi also placed a custody and control form. Respondent signed these custody and control forms to certify that the samples were his. (DX 5 and 6) Scacchi placed the samples into a metal locker so that two samples of Respondent's arm hair could be sent by the Medical Division via Federal Express to Psychomedics for testing.

Respondent had been assigned Donor number 04-0153-14-XNH. Scacchi admitted that on one of the custody and control forms that was included with one of the samples sent to Psychomedics for testing, he accidentally omitted the letter "N" in Respondent's donor number box on the form (DX 6) and he also omitted the "N" on one

sample acquisition card. Scacchi testified that on March 28, 2014, he prepared and signed a Memorandum of Record that corrected this omission (RX B). The Memorandum is included in the laboratory data package (DX 2 p. 8) that was produced by Psychemedics.

Although Respondent argued that this mistake by Scacchi shows that the collection process may have tainted the testing process, Respondent did not establish that this mere clerical error, which was quickly corrected, could have resulted in Respondent's hair samples being confused with other hair samples that were sent to Psychemedics for testing.² Respondent initialed the interior and exterior packaging for each of his sealed samples and signed custody and control forms certifying that the sealed samples were his and that he had witnessed the sample collector seal the sample in the envelope.

Had Respondent been uncomfortable with any aspect of the collection procedure, he could have refused to initial and sign and brought his concerns to the attention of a supervisor at the Medical Division. Respondent's testimony did not show that Scacchi strayed from standard collection procedures in any manner that could undermine the integrity of the hair samples he collected from Respondent. Thus, Respondent's attempt to challenge the integrity of the Drug Screening Unit's collection of his hair samples was unpersuasive.

Charlene Franklin, who is a secretary at the Drug Screening Unit, testified that she destroyed records in the normal course of Medical Division business regarding the

² See *Matter of Brinson v. Safir*, 255 A.D.2d 247 (1st Dept. 1998) (mistake in transcription of subject identification number did not affect accuracy of test results).

collection of urine samples on March 28, 2014. Franklin admitted that she mistakenly entered "3/26/15" as the date of destruction when the documents were actually destroyed on February 26, 2015 (RX D). However, this destruction does not affect the accuracy of the sample collection documents which Scacchi prepared and Respondent signed and are contained in Psychomedics' laboratory data package.

Psychomedics' Testing of Respondent's Hair Samples Collected on March 18, 2014

Dr. Thomas Cairns, the senior scientific advisor and deputy lab director at Psychomedics which has been cleared by the U.S. Food and Drug Administration for its testing methods for marijuana and is licensed by the New York State Department of Health, testified that the laboratory data package that was produced by Psychomedics (DX 2) shows that the two samples of Respondent's arm hair that were sent by the Medical Division were sent via Federal Express to Psychomedics for analysis were received with sample seals intact and that in the data package Respondent is identified only by his donor identification number. Respondent's name does not appear anywhere in the data package. Cairns further testified that the chain of custody of the samples as they were subjected to various testing procedures is documented in the laboratory data package.

Based on the qualifications cited in his curriculum vitae (DX 1), Cairns was deemed an expert in the field of forensic toxicology and specifically the laboratory analysis of hair to ascertain the presence of drugs. Cairns stated that the data package shows that both of Respondent's samples tested positive for the marijuana metabolite carboxy tetrahydrocannabinol (carboxy-THC) which is only produced after marijuana is

ingested into the body by eating, smoking or snorting, and enters the bloodstream by passing through the liver. Cairns further explained that as blood containing carboxy-THC enters the root of a strand of hair carboxy-THC becomes trapped inside the hair follicle; since hair grows at a predictable rate the growing hair acts as a time line of drug ingestion; and that arm hair has a "look back" ingestion window of six to seven months.

Cairns further explained that the initial test that Psychemedics conducts on a hair sample being tested for drug content is the enzyme immunoassay test (EIA). If EIA analysis detects that cannabinoids are present in the hair sample at a concentration at or above the administrative cutoff level of 10 picograms per 10 milligrams of hair (10pg/10mg), the hair sample is considered presumptive positive. Cairns explained that the administrative cutoff level has been established to insure that a positive result is not reported for someone who has been subjected to passive marijuana exposure.

Cairns explained that after a hair sample has tested presumptive positive, another portion of the same sample is aggressively washed to remove any external contamination and is then sent for gas chromatography mass spectrometry (GC/MS) analysis. If GC/MS analysis of the sample finds a presence of carboxy-THC at or above the administrative cutoff level of 1pg/10mg, the lab will test the second sample. Only where the first sample and the second sample both test positive via GC/MS analysis for the presence of carboxy-THC does Psychemedics report a positive finding to the Department.

Respondent's first hair sample was tested via GC/MS analysis which detected the presence of carboxy-THC at a concentration of 4.2 pg/10mg (DX 2 p. 3). According to Cairns, this concentration of carboxy-THC was over four times the administrative cutoff level. When Respondent's second sample was then tested, the GC/MS analysis detected

the presence of carboxy-THC at a concentration of 3.3 pg/10mg (DX 2 p. 3) which Cairns testified was not a significant discrepancy from the results for the first sample. Cairns opined that these results reflected multiple active ingestions of marijuana, that is three to four "joints" per month to reach the cutoff, during the six to seven month period prior to the collection of Respondent's arm hair samples on March 18, 2014. Here, Respondent was 3-4 times above the cutoff representing "considerably more" usage. Cairns further opined that passive ingestion of marijuana by Respondent would have resulted in concentrations of carboxy-THC in his hair that were "nowhere near" the administrative cutoff level and that it would take three active ingestions of marijuana per month for GC/MS analysis to even detect carboxy-THC at a level that reached the administrative cutoff level.

Cairns acknowledged that some Psychmedics lab results were rejected at a 2013 Massachusetts Civil Service Commission (MCSC) hearing concerning Boston police officers. The MCSC's ruling in that case has been appealed. Cairns also acknowledged that a judge in Wisconsin had directed that public employee drug testing be limited to urine testing only, not hair testing. However, Cairns noted that in that case the employee drug testing was conducted by a private corporation.

Cairn's expert testimony established the reliability of the Psychmedics results. In the absence of evidence which counters the reliability of the Psychmedics results, the results must be relied upon.³

³ See *Matter of McBride v. Kelly*, 215 A.D.2d 161 (1st Dept. 1995) (Positive results produced by immunoassay and mass spectrometry testing constituted substantial evidence that officer had ingested cocaine).

Respondent attempted to challenge the validity of Psychmedics' arm hair test results by introducing evidence regarding additional testing that he underwent after he was informed of Psychmedics' positive results. Each of these is discussed below.

Quest Laboratory's Testing Results Regarding Respondent's Chest Hair Sample

Respondent offered in evidence a Quest laboratory data package (RX A) which shows that EIA analysis was conducted on a chest hair sample provided by Respondent on April 1, 2014. Quest reported that this EIA analysis produced negative results. (RX A p.1). However, Cairns testified that the Quest laboratory data package shows that no GC/MS analysis was conducted on Respondent's chest hair sample and that the EIA analysis did not produce completely negative results because cannabinoids were detected in Respondent's chest hair sample. (RX A p.28). Cairns explained that had this sample gone on to GC/MS, there is a high probability it would have identified carboxy -THC. Cairns testified that Quest had erroneously reported a negative result because Quest tested at cutoff rather than for presence in reporting the EIA testing results.

The Collection and Testing of Respondent's Urine Sample

Respondent was ordered by OCCB to report to Medical Division's Drug Screening Unit (DSU), on March 28, 2014, to be DOLE tested because he had just been promoted to Detective First Grade. He was directed to produce a urine sample. This urine sample was collected by Police Officer Edmund Morrissey who is assigned to DSU. Morrissey testified that he collected a urine sample that day because there was

insufficient hair anywhere on Respondent's body that was long enough to clip for a sample. Morrissey testified that his switch from collecting a hair sample to a urine sample was approved by the sick desk supervisor; that he was not aware that Respondent had reported to the Medical Division on March 18, 2014 to be DOLE tested; that he had been directed by a lieutenant to choose two names from the four names on a Detective First Grade section of a promotion list; and that no one had suggested to him that he choose Respondent as one of the two new Detective First Grades who should be tested.

Morrissey admitted that on the custody and control form he prepared regarding Respondent's urine sample he mistakenly checked the box that this was a "random" test when he should have checked the box that this was a "promotion" test (RX F). The urine sample was tested and produced a negative result for marijuana metabolites. Cairns explained that because carboxy-THC will only be detected in a urine sample if marijuana has been ingested by a non-chronic user within 72 hours of the collection of the urine sample, the fact that the urine sample tested negative for marijuana metabolites does not in any way negate the reliability of the Psychomedics testing results regarding Respondent's arm hair samples.

Detective Theresa Knapp, who is assigned to OCCB, explained that the list of those UMOS assigned to OCCB who will be random tested is created by a computer at MISD. Knapp testified that it was not unusual or out of the ordinary that Respondent was DOLE tested twice during the month of March, 2014, because the March 18 DOLE test was conducted because the computer at MISD had randomly selected his name from the list of all UMOS assigned to OCCB, and the March 28 DOLE test was conducted

because his name was on a short list of those UMOS assigned to OCCB who had just been promoted to Detective First Grade in January.

Also, Charlene Franklin, a secretary assigned to DSU, explained that in the normal course of business she is directed to shred documents relating to a DOLE test where an MOS has tested negative after DSU is notified of the negative testing result. She agreed that with regard to Respondent's negative promotional test result, although she actually shredded the documents relating to his DOLE test on February 26, 2015 she inadvertently entered in the shredding log that she had shredded these documents on March 26, 2015.

Finally, Sergeant Michael Reese, who is assigned to DSU, explained that although documents relating to a DOLE test where an MOS has tested negative are normally supposed to be shredded soon after DSU is notified of the negative testing result, because DSU is "backed up" with documents that need to be shredded, it was not unusual that the documents relating to Respondent's DOLE test on March 28, 2014 were not shredded until February, 2015. He also testified that it was not unusual that even though Respondent was promoted to Detective First Grade in January, 2014, he was not DOLE tested regarding this promotion until March 28, 2014.

Based on the above credible testimony, I reject Respondent's contention that the reason that Police Officer Morrissey collected urine samples rather than hair samples from Respondent on March 28, 2014, was because there was a conspiracy to insure that Respondent could not test negative regarding hair samples collected only ten days after the collection of hair samples which Psychemedics had reported tested positive. I also reject Respondent's supposition that the reason that documents regarding this DOLE test

were shredded in February, 2015 was to cover-up the real reason for the hair-to-urine collection switch.

The Testing of Respondent's Independently Collected Hair Sample

On May 30, 2014, Labcorp, a North Carolina corporation, sent a head hair sample that it asserted had been collected from Respondent's head to Psychemedics for testing. Psychemedics reported that EIA analysis produced negative results for marijuana. (RX C) However, Cairns testified that, although Labcorp did not specify the length of the hair it had collected, Psychemedics determined that it was 2.2 centimeters which, based on head hair growth rate, reflected a look back period of "probably six weeks" from the collection date of May 30, 2014. Since Respondent's arm hair samples were collected by Scacchi on March 18, 2014, the look back time period of the head hair sample Labcorp collected from Respondent does not overlap the look back time period of the arm hair samples that were collected by Scacchi. Thus, the fact that Psychemedics' testing confirmed that Respondent did not actively ingest marijuana during the six week period prior to May 30, 2014, does not negate Psychemedics' findings that Respondent actively ingested marijuana during the six to seven month period prior to March 18, 2014.

Respondent's Character Evidence

Respondent offered witnesses who testified to his good character and his performance as a member of the service.

Retired Detective Darryl Smith testified that he worked with Respondent for 7 years; that he is an "honorable man," a "good person," and a "good cop," and that he

never exhibited any signs of drug use. Lieutenant Kevin Brown similarly described Respondent and stated that he had recommended that Respondent be promoted to First Grade Detective.

Conclusion

Based on the trial record, I am left with no other choice but to find Respondent guilty of having possessed and ingested marijuana.

As to the charged time period, Cairns testified that based on the normal growth rate for arm hair and based on the fact that part of a strand of hair that has just emerged from the hair root under the skin is too close to the surface of the skin to be clipped, Respondent's arm hair samples would not have reflected marijuana ingested by Respondent during up to a seven-day period prior to the collection of Respondent's arm hair samples on March 18, 2014. Accordingly, Respondent is found guilty of ingesting marijuana between September 18, 2013 and March 11, 2014 (not March 18, 2014).

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. *See Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on January 21, 1985. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

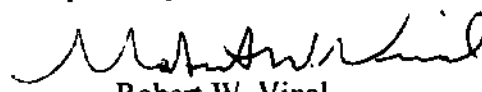
Respondent has been found Guilty of possessing and ingesting marijuana without police necessity or authority. Since uniformed members of this Department enforce the

Penal Law crimes relating to possession of controlled substances including marijuana, the Department has a strong interest in insuring that members do not personally violate these laws by possessing illegal drugs, including marijuana. Also, since members are on 24-hour call and must be fit for duty at all times, the Department has a strong interest in insuring that members are not using illegal drugs which can have an adverse effect on their on-duty performance.

As a result, the penalty that has been consistently imposed on uniformed members who have been found Guilty of possessing and ingesting marijuana, without police necessity or authority, is dismissal from the Department. See *Case No. 81455/05* (August 3, 2007) where a 23-year member was dismissed from the Department for possessing and ingesting marijuana, confirmed sub nom. *Matter of Chiofalo v. Kelly*, 70 A.D.3d 423 (1st Dept. 2010); *Case No. 85554/09* (January 5, 2011) where a 16-year member who had no prior disciplinary record was dismissed from the Department for possessing and ingesting marijuana; and, most recently, *Case No. 2014-11720* (April 2, 2015) where a 19-year member with no prior disciplinary record was dismissed from the Department for possessing and ingesting marijuana; and *Case No. 2014-12161* (July 30, 2015) where a four-year member was dismissed from the Department for possessing and ingesting marijuana.

Accordingly, it is recommended that Respondent be DISMISSED from the New York City Police Department.

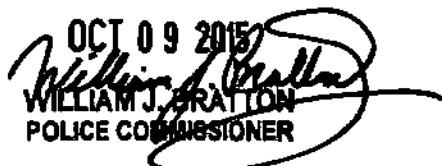
Respectfully submitted,



Robert W. Vinal

Assistant Deputy Commissioner – Trials

APPROVED

OCT 09 2015

WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner - Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
DETECTIVE CECIL WAITHE
TAX REGISTRY NO. 886691
DISCIPLINARY CASE NO. 2014-11611

Respondent received an overall rating of 4.5 on his 2012-2013 annual performance evaluation, on his 2011-2012 annual evaluation, and on his 2010-2011 annual evaluation. He has been awarded one Medal for Merit/Valor, one Honorable Mention and one Excellent Police Duty medal. [REDACTED]

[REDACTED] He has no prior formal disciplinary record and no monitoring records other than being suspended without pay regarding these charges.

For your consideration.



Robert W. Vinal
Assistant Deputy Commissioner - Trials